MOTION FILED
SEP - 4 1996

(2)

No. 96-243

In the

Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,
Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE and BRIEF AMICUS CURIAE OF THE TAHOE-SIERRA PRESERVATION COUNCIL, INC. IN SUPPORT OF PETITIONER, BERNADINE SUITUM

LAWRENCE L. HOFFMAN
COUNSEL OF RECORD

Hoffman Law Offices
3000 N. Lake Boulevard
Post Office Box 7740
Tahoe City, California 96145
Telephone: (916) 583-8542

Attorneys for Amicus Curiae

19 pp

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE TAHOE-SIERRA PRESERVATION COUNCIL, INC. IN SUPPORT OF PETITIONER BERNADINE SUITUM

Pursuant to Supreme Court Rule 37, the Tahoe-Sierra Preservation Council, Inc. respectfully moves this Court for leave to file the attached Amicus Curiae brief in support of Petitioner Bernadine Suitum. Written consent to the filing of this brief has been granted by counsel for the Petitioner, and has been lodged with the Clerk of this Court. Respondent Tahoe Regional Planning Agency, acting through its Counsel of Record, has refused to grant its consent, necessitating the filing of this Motion.

Amicus Curiae Tahoe-Sierra Preservation Council, Inc., is a non-profit membership corporation organized under the laws of the State of California for the purpose of representing the interests of its approximately 2000 members, each a Lake Tahoe Basin property or business owner, before the applicable regional, state, and local regulatory agencies. The Tahoe-Sierra Preservation Council is also the lead plaintiff, along with approximately 450 of its individual members who are also named-plaintiffs, in twin lawsuits now consolidated and pending in the U.S. District Court, District of Nevada, before the Honorable Edward C. Reed (Case No. CV-N-84-257 ECR) involving "takings claims" brought against the Respondent Tahoe Regional Planning Agency ("TRPA"). Those pending cases have been before the Ninth Circuit Court of Appeals on three separate occasions, and include:

- *TSPC I* – *Tahoe-Sierra Preservation Council, Inc., et al. v. Tahoe Regional Planning Agency*, 911 F.2d 1331 (9th Cir. 1990), cert. den. 499 U.S. 943 (1991)

- *TSPC II* – *Tahoe-Sierra Preservation Council, Inc., et al. v. Tahoe Regional Planning Agency*, 938 F.2d 153 (9th Cir. 1991)

- *TSPC III* – *Tahoe Sierra Preservation Council, Inc., et al., v. Tahoe Regional Planning Agency*, 34 F.3d 753 (9th Cir. 1994), cert. den. __U.S.__, 115 S. Ct. 1401 (1995)

The issues at stake in the instant lawsuit which is the subject of the Petition for Writ of Certiorari are also issues involved in the aforementioned pending litigation brought by the Amicus Curiae against TRPA, and are otherwise issues of vital concern to all affected property owners in the Lake Tahoe Basin who are subject to the regulatory requirements of TRPA.* Accordingly, the Tahoe-Sierra Preservation Council has a strong and direct interest in the proper resolution of these important Constitutional issues, given the impact of the regulatory provisions adopted by TRPA upon

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* Counsel of Record for the Amicus Curiae is also counsel in a case now pending before the U.S. District Court, Eastern District of California, in which issues directly involving those addressed in the instant Petition are being raised as a defense by TRPA -- *Tahoe Regional Planning Agency v. Romolo and Helen Barbieri*, E.D. of Calif., No. CVS-94-1380 LKK.

the Council's members and other property owners within the Lake Tahoe Basin.

Amicus seek here to augment the arguments set forth in the Petition for Writ of Certiorari, and to provide to this Court the perspective of an organization that is intimately familiar with the workings of the Respondent TRPA and the effects of the regulatory provisions at issue on Lake Tahoe Region property owners.

For the foregoing reasons, the Tahoe-Sierra Preservation Council respectfully requests that their Motion to file the accompanying Amicus Curiae Brief be granted.

DATED: September 4, 1996.

Respectfully submitted,

Lawrence L. Hoffman
Attorney for Amicus Curiae
Tahoe-Sierra Preservation
Council, Inc.

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BRIEF AMICUS CURIAE OF THE TAHOE-SIERRA PRESERVATION COUNCIL, INC. IN SUPPORT OF PETITIONER BERNADINE SUITUM

INTERESTS OF AMICUS CURIAE

The interests of the Amicus Curiae Tahoe-Sierra Preservation Council, Inc., are set forth in the preceding Motion and are adopted herein.

SUMMARY OF ARGUMENT

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court held that where a governmental land-use regulatory agency adopts a regulation prohibiting a private property owner from making ***all*** economically beneficial use of his or her private property in the name of the common good by banning any building or other structures on that property, a "categorical taking" has occurred triggering the Just Compensation requirements of the Fifth Amendment. The facts at issue in the instant case fit the *Lucas* categorical takings rule like a glove with one new twist. To insulate itself from a "takings challenge", the Respondent TRPA, the regulatory agency involved, simply appended to its total prohibition-on-use regulation a post-takings "transferable rights (TDR)" scheme by which the property owner could theoretically recoup a small portion of the lost value of her valuable property by selling to another

private party certain so-called "transferable rights" bestowed on her by the agency after they prohibited all use of her property. The Ninth Circuit, muddling the concept of potential post-takings recoupment of lost value with the denial of all "use" upon the adoption of the regulation as instructed by *Lucas*, effectively created a gaping new hole in the *Lucas* categorical takings rule by requiring that the property owner -- whom it is undisputed is now totally precluded from building upon her vacant homesite parcel -- first fully exhaust this agency-created, post-takings TDR scheme before her takings claim is deemed judicially "ripe".

Further, given the high-profile role of the Respondent TRPA and the widespread attention throughout at least the Western United States given to TRPA's creative and far-reaching regulatory provisions, it is apparent that if the Ninth Circuit's decision is allowed to stand, the doors will now be wide open to numerous other land-use and environmental regulatory agencies to pursue the same course of action -- that is, to attempt to insulate their open space, greenbelt, wetlands, watershed protection, and related regulatory programs from judicial challenge by merely appending an equally creative, post-takings TDR scheme to make "unripe" the very takings claims this Court has already found in *Lucas* to be "categorical". Accordingly, if this Court's decision in *Lucas* is to be respected by land-use regulators across the land, it is essential that this Court quickly respond to this new flair up of creative resistance to the dictates of the Fifth Amendment by agreeing to hear and to decide these extremely important Constitutional issues raised by the decision of the Ninth Circuit below.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT'S DECISION IN THIS CASE, IF ALLOWED TO STAND, DRIVES A GAPING HOLE INTO THE "CATEGORICAL TAKINGS RULE" CAREFULLY CONSIDERED AND ARTICULATED BY THIS COURT IN *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL*

Four years ago, this Court determined under facts remarkably similar to the facts of the instant case that a property owner who has been denied ***all*** economically beneficial ***use*** of his or her vacant single-family residential property as a result of the adoption or application of a governmental land-use regulatory enactment has suffered a "categorical taking" invoking the protection of the Fifth Amendment. Thus, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court attempted to set this long-lingering issue to rest when it held:

> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking. *Id.* at 1019. [emphasis in original]

In *Lucas*, this Court carved out only one narrow exception to the "categorical rule" it enunciated, which exception is not relevant here -- i.e., where the regulation deprives the landowner of all economically beneficial use of his or her land, the State "may resist compensation only if

. . . [it] shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027.

Nowhere in *Lucas* did the Court suggest or even hint that there may be still another gaping hole or exception in the protections afforded by the Fifth Amendment, such as that now suddenly fashioned by a creative environmental regulatory agency and upheld by the District Court and the Ninth Circuit in the case of the Petitioner, Mrs. Suitum.[1] That new "exception" if allowed to stand -- a carefully-crafted litigation defense mechanism under the rubric of "transferable development rights (TDRs)" -- will most likely quickly be latched onto by numerous land-use regulators, at least throughout the Ninth Circuit, as a way to help protect them from suit, thus threatening to again submerge the well-articulated substantive rule in *Lucas* into a new procedural quagmire.

To hear the Ninth Circuit describe this newly-created ripeness barrier or "exception" to the *Lucas* categorical takings rule, all the regulatory agency has to do when it adopts a land-use regulation prohibiting ***all*** economically beneficial ***use*** of a person's private property in the name of the common good is to be sure to include a provision granting that property owner some form of post-takings "transferable rights"[2] -- purported new "rights" the property

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[1] Inexplicably, in spite of the clear import of this Court's decision in *Lucas v. South Carolina Coastal Council, supra*, the Ninth Circuit in their Opinion in the instant case made no mention of or reference to *Lucas*, nor did it offer any explanation whatsoever as to why it did not consider *Lucas* to be relevant to its analysis.

[2] The post-takings TDR program implemented by TRPA is applicable only to property owners whose lands have already been designated by TRPA as "environmentally

owner may or may not be able to sell at some unknown point in the future to some unknown buyer, and for some unknown amount of dollars, in a secondary TDR marketplace created solely by the agency by placing an artificial limit on the availability of those "rights" to other property owners. Thus, by the magic stroke of the regulator's pen, the agency is again able to insulate itself from a takings challenge, at least according to the Ninth Circuit, until the property owner whose land has been prohibited from use first demonstrates that he or she has attempted to fully navigate this new TDR minefield by showing how or in what manner the purported TDR "rights" did or did not ultimately provide that owner with any modicum of post-takings compensation. The result is to place an enormous if not impossible new burden on the property owner, thus effectively blunting the clear dictates of the *Lucas* categorical takings rule.

It requires little foresight to anticipate how creative and determined land-use regulators and governmental attorneys, just like those employed by the Respondent TRPA, will now latch onto this new tool in their arsenal and turn their energies to fashioning the most high-sounding, seemingly plausible, "TDR systems" to be incorporated as part of their regulatory prohibitions, so as to leave at least the superficial impression they really have not "taken" ***all use*** because they have also allowed the beleaguered property owner new "rights" to be sold in an agency-created TDR marketplace.

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sensitive", and thereby made ineligible for building by TRPA. At that stage, once a property owner's property is so designated by TRPA, the property owner then becomes eligible by TRPA to pursue one of the highly speculative TDR options as a means to possibly recoup some very limited dollars for the loss of value of his or her property -- but not to restore any actual viable ***use*** to that property.

The stark reality is that the cleverly-crafted "TDR gimmick" fashioned by TRPA as part of its regulatory scheme has nothing at all to do with Mrs. Suitum's ***use*** of her property, but in fact is merely a transparent attempt to allow her the possibility of recouping some limited post-takings compensation in a secondary private marketplace created by TRPA to help defend it from a total takings claim.[3] Unfortunately, both the District Court and the Ninth Circuit fell for this gimmick lock, stock and barrel -- concluding that in fact the "transfer of development rights"

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[3] It is undenied that TRPA affirmatively prohibited *all **use*** of Mrs. Suitum's vacant residential lot, which she and her now deceased husband owned for many years in anticipation of building a retirement home, by its designation of the parcel as an "SEZ property" with a "zero IPES score". The consequence of that designation was that Mrs. Suitum was totally prohibited from placing a home or any other structure or "land coverage" on her property. To hammer the last nail into the proverbial coffin, TRPA also ordained that even if Mrs. Suitum decided to exercise her precious new "right" to sell one or more of the TDRs they had belatedly bestowed upon her, she must first agree to record a so-called "Deed Restriction" which "permanently retired" her lot -- that is, requiring her to "voluntarily" agree to permanently greenbelt her lot in order to exercise her "privilege" to recoup some meager portion of her lost "value" by selling one of the TDR rights, assuming she could even find a buyer. And, to add further insult to injury, according to the Ninth Circuit Mrs. Suitum had no ability to seek redress in the courts unless and until she first attempted to sell one of those TDR rights, and if she were successful in finding a buyer, first "Deed Restricting" her property, at which point her case would finally "ripen" sufficiently so that she could then be allowed to pursue the protection of her Constitutional rights in the federal courts.

purportedly made available to Mrs. Suitum created a new ***use*** of her property that must first be fully exhausted and evaluated as part of the "takings calculus" (Dist. Crt's. Order, App. C at C-3) before she could file and pursue her takings claim in federal court. But the unvarnished truth is this TDR gimmick -- no matter how high-sounding its label -- has nothing whatsoever to do with the ***uses*** available to Mrs. Suitum on her property, but only with the possible recoupment at some later point of some meager damages for the loss she has already suffered resulting from TRPA's total prohibition of ***any use*** of her valuable residential parcel.

Lucas leaves no question that the proscriptions of the Fifth Amendment that "private property shall [not] be taken for public use, without just compensation" means exactly what it says. As was repeatedly underscored by this Court in *Lucas*, the central focus is necessarily on the ***uses*** that have been circumscribed by the governmental regulation at issue, that is the ***uses*** which remain after the regulation has become effective, not on the amount of devaluation of the property due to the regulations. Time and time again, this Court in *Lucas* stressed this primary focus as to the ***uses*** which remained after the regulation's adoption. See, for instance, the discussion in the majority opinion in *Lucas* at 1015: "The second situation in which we have found categorical treatment appropriate is where regulation denies all ***economically beneficial or productive use*** of land"; and at 1015, citing *Agins v. Tiburon*, 447 U.S. 255 at 260, ". . . the Fifth Amendment is violated when regulation . . . denies an owner ***economically viable use*** of his land"; and at 1016, citing *Keystone v. Bituminous Cole v. DeBenedictis*, 480 U.S. 470 at 495: "A statute regulating the ***uses*** that can be made of property effects a taking if it 'denies an owner ***economically viable use*** of his land'"; and at 1016, ftnt. 7: ". . . the force of our 'deprivation of ***all economically feasible use***' rule is greater than its precision . . ."; and at 1019: ". . . when the owner of real property has been called upon to sacrifice ***all economically beneficial uses*** in the

name of the common good, that is to have his property economically idle, he has suffered a taking."

In the case of Mrs. Suitum -- as was the case with Mr. Lucas's beachfront property in South Carolina -- there is simply no dispute that the regulations adopted by TRPA in the name of environmental protection did in fact deny her ***all*** further ***use*** of her vacant, single-family residential parcel located in an established, nearly built-out, residential neighborhood. This was achieved simply by designating her lot as a protected "Stream Environment Zone (SEZ)" parcel, and then flatly prohibiting any "new land coverage or other permanent land disturbance" on her parcel. App. E at E-1. Upon the date of the adoption of the SEZ designation, Mrs. Suitum's private property became entirely ***useless*** -- there being no economically viable beneficial ***use*** to which she could thereafter put her homesite parcel. In a nearly identical manner, the South Carolina Beachfront Management Act as it was implemented by South Carolina's Coastal Council also placed Mr. Lucas's single-family residential lots in a similar "coastal protected area", as to which all new "occupiable improvements was flatly prohibited." *Lucas*, 505 U.S. at 1009. In any event, it cannot and has not been disputed that the clear effect of TRPA's regulatory enactment at issue was to prohibit the construction of a home on Mrs. Suitum's single-family homesite, the only remaining ***use*** that would otherwise be consistent with the underlying zoning and "allowed uses" in the surrounding residential neighborhood, all in the name of "environmental protection" for the common good.

Interestingly, in *Lucas* the regulations there at issue would have allowed Mr. Lucas to actually construct certain small walkways and decks on his beachfront parcel having a total area of not more than 144 square feet, which even this Court found hardly was a viable "use" sufficient to defeat his takings claim. See *Lucas*, 505 U.S. at 1009, ftnt. 2. In contrast, the TRPA regulations at issue did not allow Mrs.

Suitum to make even that minimal "use" of her property by constructing a similar small structure on her property. Instead, TRPA allowed her only the "right" to transfer (sell) up to 183-square feet of "land coverage" to another property owner to in turn be "used" only on that purchaser's property (TRPA also restricted the base amount of "land coverage" available on the other potential purchaser properties), assuming Mrs. Suitum could even find a purchaser.

Of course, if the Ninth Circuit is right, then South Carolina blew it when they drafted their statute allowing Mr. Lucas to actually build 144 square feet of structures on his property, rather than simply allowing him the "right" to transfer that potential construction area to someone else's property, and thereby to recoup some of the dollars that he may have lost in the value of his land due to South Carolina's similar prohibitions on use. How easy it would have been for South Carolina to have avoided Mr. Lucas's takings challenge if only they had known and understood the magic powers of TDRs as now fashioned by the Ninth Circuit. All South Carolina really needed to have done, instead of actually allowing Mr. Lucas to build up to 144 square feet of walkways on his property, was to allow him to "sell" that purportedly valuable "right" to his neighbor or some other restricted property owner -- in which case, according to the Ninth Circuit, the Coastal Council could have insisted that Mr. Lucas first make every effort to sell that valuable "right", determine its actual value, or show that he was not able to sell that "right" before he could pursue his takings claim in court.

The central flaw in the Ninth Circuit's analysis is that it has fallen into the very trap TRPA intended -- allowing TRPA to redefine and refocus the entire taking's inquiry, and again placing a monumental burden back on the property owner to show he or she has "ripened" his or her case before seeking the judicial redress for the "total taking" *Lucas* clearly held to be "categorical". The upshot is that the

analysis is no longer focused on the ***uses*** that were precluded to Mrs. Suitum, and whether TRPA in fact denied her *all* beneficial and productive ***use*** of her land, but instead whether Mrs. Suitum can now meet a new post-takings burden imposed upon her to show she has fully exhausted the highly complex TDR system created by TRPA to attempt to recoup a small part of her takings damages. This, of course, places an enormous if not impossible new burden upon the property owner to demonstrate the "ripeness" of his or her case by first showing that he or she has done everything possible to find a buyer in the secondary private marketplace created by TRPA willing to purchase a "right" allegedly bestowed by TRPA to buy "land coverage" or an "allocation", a TDR right available only to a property owner whose property has already been made subject to a total and permanent building prohibition.

Of course, the post-taking sale of that "transferrable development right", even if consummated, is in fact nothing more than the sale of a "chit of paper" that results at best in the recoupment by Mrs. Suitum of a few meager dollars, and has nothing whatsoever to do with the ***uses*** to which Mrs. Suitum can now put her own property.[4] But, in muddling the concept of "***uses***" with the concept of "***value***", the Ninth Circuit found that even if Mrs. Suitum could only recoup a very small part of her lost value by the sale of a TDR, that would defeat her takings claims, as "regulatory ordinances that merely diminish the value of property [do] not constitute a taking." App. A at A-12. The difficulty is that by focusing its attention on this issue of potential recoupment of

[4] The Ninth Circuit, in their haste to avoid facing Mrs. Suitum's takings claim head-on, also summarily found without citation to any precedent "that within that [TRPA regulatory] scheme, transfer of development rights is a 'use' of SEZ property". App. A at A-9.

"value," the Ninth Circuit lost sight of the fact that the Fifth Amendment, as *Lucas* instructs, commands that the focus be on the "***uses***" precluded. As *Lucas* makes clear, if it is found a regulation prohibits *all* economically beneficially ***uses***, that is the end of the inquiry. No post-taking remedy designed merely to provide the property owner with the speculative ability to recoup some limited dollars in the private marketplace for the taking which has already occurred should have any relevance, once a categorical taking is found to have occurred.

II

THE TDR MECHANISM BLESSED BY THE NINTH CIRCUIT IN THE INSTANT CASE IS LIKELY TO BLOSSOM INTO THE PREFERRED TAKINGS-DEFENSE TOOL BY LAND-USE REGULATORS, AT LEAST IN THE NINTH CIRCUIT, UNLESS QUICKLY NIPPED IN THE BUD BY THIS COURT

Is this a situation limited only to Mrs. Suitum? Certainly not in the Lake Tahoe region, where the bi-state TRPA regulatory agency has attempted to insulate itself from "takings claims" arising from its otherwise pervasive prohibitions on the use of hundreds of vacant single-family homesites by the simple magic of allegedly making available a post-takings TDR system as an option to the beleaguered property owners. In that regard, the Amicus in the instant case, a non-profit membership organization, is currently representing hundreds of property owners whose lands have otherwise been totally "taken" by TRPA. For over twelve years, those property owner-plaintiffs have been pursuing their claims to Just Compensation for that taking in the federal courts, as against the several defenses raised by TRPA, including in part the same "TDR defense" at issue in the *Suitum* case. See, *Tahoe-Sierra Preservation Council, et*

al. v. Tahoe Regional Planning Agency ["*TSPC I*"], 911 F.2d 1331 (9th Cir. 1990), cert. den. 499 U.S. 943 (1991); *Tahoe-Sierra Preservation Council, et al. v. Tahoe Regional Planning Agency* ["*TSPC II*"], 938 F.2d 153 (9th Cir. 1991); and *Tahoe-Sierra Preservation Council, et al. v. Tahoe Regional Planning Agency* ["*TSPC III*"], 34 F.3d 753 (9th Cir. 1994), cert. den. ____ U.S. ____, 115 S. Ct. 1401 (1995). Also, See *Carpenter v. Tahoe Regional Planning Agency*, 804 F. Supp. 1316 (D. Nev. 1992).

Given the prominent role of the TRPA and its high profile regulatory program in the Lake Tahoe Basin, and given the widespread attention throughout California and the Western United States to the creative and far-reaching regulatory mechanisms being attempted by TRPA, it is all too apparent that should the Ninth Circuit's decision be allowed to stand in this case, the doors will be wide open to numerous other state and local land-use and environmental regulatory agencies to pursue the same course of action -- that is, to attempt to insulate their newly-adopted open space, greenbelt, wetlands, watershed protection, and other similar regulatory requirements barring all use of private property by merely appending thereto a comparable post-takings TDR mechanism requiring exhaustion by the property owner, thereby at a minimum significantly delaying if not avoiding altogether an affected property owner's takings challenge in court.

In brief, if this Court's decision in *Lucas* is to be respected by land-use regulators in the Ninth Circuit, if not across the land, it is essential that the Court quickly respond to this new flair up of creative resistance to the clear dictates of the Fifth Amendment and the legal principles this Court so carefully articulated and mandated in *Lucas*. Should the Ninth Circuit's decision in *Suitum* be allowed to stand, it is clear that the courthouse doors will not only effectively be barred to Mrs. Suitum, but most likely will be closed to scores of others who will soon find their properties totally

from any viable "use" in the name of environmental protection, thereby again denying them an effective, judicially-protected remedy under the Fifth Amendment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Ninth Circuit at issue in the instant Petition is not only in direct conflict with the express holding of this Court in *Lucas v. South Carolina Coastal Council* and other well-established case law, but threatens to undermine the essential protections afforded to private property owners by the Fifth Amendment. Accordingly Amicus Curiae respectfully urges this Court to grant the Petition for Writ of Certiorari in order to hear and decide these extremely important Constitutional issues.

DATED: September 4, 1996.

Respectfully submitted,

LAWRENCE L. HOFFMAN
ATTORNEY FOR AMICUS CURIAE
TAHOE-SIERRA PRESERVATION COUNCIL, INC.
& COUNSEL OF RECORD